

PROTECTING LIFE FUNCTIONS, ECONOMIC INTERESTS, PROPERTY RIGHTS AND AESTHETIC PREFERENCES IN GEORGIA'S WATERS

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INTRODUCTION

News accounts describe the current tensions among Georgia, Alabama and Florida in typical polemical terms as the "tri-state water war!" However, controversies among states that share interstate water courses or lakes can be settled through recourse to several long-accepted water dispute resolution alternatives. Existing statutes and common law principles form the basis for resolution of this controversy.

Alabama, Georgia and Florida are presently engaged in a sometimes bitter contest over shared use of the water in the Chattahoochee and Coosa river systems. Alabama filed a suit in June, 1990 against the U.S. Army Corps of Engineers to halt a Corps plan to divert water from the Chattahoochee and Coosa Rivers for use in Atlanta and other Georgia cities, but the parties have agreed to attempt to negotiate a settlement that will accommodate the interests of three states whose interests are involved.

There is reason to be optimistic that an accord can be fashioned. More than ever before we have developed various sorts of quantity and quality data on the river systems involved that can inform a decision by the negotiators or the court. Essentially, it is a question of equitable apportionment of both quality and quantity elements of the water resource. An important part of the law to consider in attempting to understand how disputes like this are to be resolved is the area identified as "interstate allocation."

Here I will briefly review the three most important approaches to allocation of interstate streams and lakes among disputing states: (1) states may originate a suit between or among themselves in the U.S. Supreme Court; (2) they may enter an interstate compact for consideration by the Congress; and (3) Congress may exercise its constitutional authority to allocate directly the subject waters.

THE U.S. SUPREME COURT FORUM

The first method, filing an original action in the U.S. Supreme Court, was not resorted to in the Alabama/Georgia case. That suit was designed, in part, to challenge operation by the U.S. Army Corps of Engineers of certain impoundments in Georgia. Rather, this initial challenge raised the question of reauthorization of federal reservoirs operation to be discussed below.

The major elements of the Supreme Court's exercise of its original jurisdiction in interstate water disputes will be only briefly treated here. Equitable apportionment, or fair allocation, is the preferred approach of the Court (Tarlock, 1989).

The Court has had to adjust its constitutionally derived jurisdiction in such matters with the 11th amendment's bar to citizens of one state suing citizens of another state. It has adopted all sorts of characterizations or fictions to meet the reasonable and practical demands of a growing and modernizing society. A state is deemed to be acting as "parent" of its citizens, and it must present persuasive evidence of injury to succeed in its petition against an upstream state.

The role of state law in the Court's deliberation evolved over the years. Thus, "fair allocation rather than consistency with locally generated expectations became the touchstone of the principle of equitable apportionment" (Tarlock, 1989). Local law maintains an important role, and, while federal law is dominant in the final analysis, state standards are relevant. Generally, in prior appropriation states, the Court embraces the elements of that system. In riparian rights jurisdictions, to the extent consistent with equitable apportionment principles, the Court applies the common law. If the Alabama/Georgia/Florida controversy were ever to be submitted to the Court, it is likely the outcome would be determined by an accommodation and blending of the laws of the three states involved. This probable outcome is based on the discernible practice of the Court to look to the laws of the contesting states to "inform" its

apportionment decisions. This approach would include explicit application of the "systems - sensitive" elements of the federal Clean Water Act of 1977 (CWA) which means that there are now federal law standards directly applicable to the water resources that must also be considered in flow adjustments and related animal life conservation requirements.

THE INTERSTATE COMPACT

A second approach to the allocation of interstate streams is the interstate compact. "A compact is both a federal law and contract between or among the signatory parties" (Tarlock, 1989). It is said to be the preferred method because it is a mechanism that is uniquely adapted to secure a comprehensive integration of the numerous and varied elements that the necessities a complex, modern society dictate. In some form, Congress must approve a compact because of the constitutional provision that "No State shall, without the Consent of Congress,...Compact with another state, or with a foreign Power...."

Once properly ratified, private water rights holders and claimants are controlled by the compact provisions. In recent times, the Court has moved to prevent "Balkanization," or the formation of numerous, smaller and often hostile government entities that have the effect of restricting commerce, of state-administered natural resources, including water, by declaring that water is an article of interstate commerce. Thus, it would appear that certain self-serving or regionally exclusive "deals" made via Compact could violate this new approach to the resource by the Court. However, Congress can approve legislation that accomplishes ends that, if the compact were not involved, would clearly violate the expansive reach of the commerce clause (Tarlock, 1989). Recitation of the phrase, "commerce clause," is the short hand acknowledgement of the authority delegated to the Congress by the Constitution to regulate commerce among the states.

Negotiation of a compact is a lengthy and complicated undertaking. However, this approach may hold the best long-term solution to the problems of water supply and quality that have been raised in the current tri-state water dispute.

CONGRESSIONAL APPORTIONMENT AUTHORITY

A third approach to equitable division of interstate rivers and lakes is to seek Congressional apportionment. This authority inheres in the Congress through the commerce clause. However, it is a seldom used power and is very unlikely to be brought to bear in the present Alabama/Georgia/Florida dispute.

I am often surprised by the extent of misunderstanding, even among natural resource professionals, of the power of the federal government to affect natural resource allocation decisions pursuant to its authority under the commerce clause of the Constitution.

While many states have claimed that they "owned" the water within their boundaries, the Court has held that this "ownership" is nothing more than a claim of right to exercise the police power. States have been barred for many years from preventing the export of commodity natural resources (Tarlock, 1989). In 1966, the Court applied the same restriction on a state attempting to hoard its resources via a ban on the transboundary movement of water (*City of Altus v. Carr*, 1966). The policy behind these prohibitions is to prevent states from becoming little "fiefdoms" or sovereignties unto themselves - thus denying our federal system.

The 1982 case of *Sporhase v. Nebraska* overturned a Nebraska statute that prohibited interstate transport of water unless the importing state had a reciprocal arrangement with Nebraska. The Court held this provision was discriminatory against interstate commerce because it was not designed or restricted sufficiently to protect only legitimate state preservation and conservation purposes.

REAUTHORIZATION OF EXISTING IMPOUNDMENTS

In view of the federally constructed or regulated impoundments in the Chattahoochee River basin, some sort of project reauthorization may be necessary or desirable - however politically difficult. One of the major water components in the present controversy is the operation of Lake Sydney Lanier - impounded by the Buford Dam.

One solution deserving attention is some form of re-regulation of the operation of Buford Dam. If peak power releases from Buford Dam were eliminated, a smooth, continuous release of an increased supply of water would reduce the need for other solutions. The study of a re-regulation of Buford Dam may be accomplished under § 216 of the Flood Control Act of 1970, P.L. 91-611:

"The Secretary of the Army, acting through the Chief of Engineers, is authorized to review the operation of projects the construction of which has been completed and which were constructed by the Corps of Engineers in the interest of navigation, flood control, water supply, and related purposes, when found advisable due to the significantly changed physical or economic conditions, and to report thereon to Congress with recommendations on the advisability of modifying the structures or their operation, and for improving the quality of the environment in the overall public interest."

Of course, a reauthorization of the reservoir by direct

congressional action does not depend on previous statutory authority to allow storage space for water supply or for other uses. Congress may provide, within broad parameters, for a total reorientation of the project to include water supply and recreation as authorized project purposes, abolishing the flood control and power generation functions. If Congress approves a reauthorization plan which includes water supply storage, however, it will be presumed, unless expressly countered by the legislation, to be pursuant to the policy of 33 U.S.C. § 390b. This act preserves applicable state law in the distribution of such storage-space water by stating in subsection (c) that the act does not modify § 1 of the Flood Control Act of 1944. That act, 33 U.S.C. § 701-1, sets out a broad policy in the preamble that state water rights will be maintained in the development of federal water projects. In subsequent provisions of the act, the specific protection afforded state water law rights is extended only to western appropriation states.

Whether or not the statute would be held to also protect state water rights in eastern states, the Corps' policy in contracting for storage space in eastern states under this act is to specifically require the user to take the responsibility of acquiring, in accordance with state law, all water rights needed for utilization of the storage space, and specifically disclaiming any responsibility of the federal government for subsequent uses of the water. The 1977 amendments to Georgia's riparian water law scheme significantly broadened the list of potential users of the state's water resources. Now, except for exempt classes, water rights are secured through a permit process. Despite this contractual "hands off" attitude assumed by the Corps, discretionary decisions as to recommendations for a new overall scheme may be affected by the local interest's ability to solve all the legal problems attendant to the scheme. Georgia's Surface Water Act of 1977 presumably could meet Corps standards in this regard.

THE IMPACT OF THE NATIONAL ENVIRONMENTAL POLICY ACT

A final point concerning the reauthorization process is that any new regulatory and operation scheme will require an environmental impact statement under NEPA. The present fragile five-year study proposal between Georgia and Alabama (The Atlanta Constitution, 11/19/90) should allow ample time to gather the data needed to comply with this federal mandate. Under the impetus of the threat of a major law suit in the U.S. Supreme Court, the parties may be surprised about how well they can document their various proposals for environmentally attractive solutions to this interstate problem.

Depending on the comprehensiveness of efforts to respond to the problems raised by the tri-state water dispute and the degree of federal involvement, it is likely

that a programmatic impact statement under NEPA will be required. This conclusion is supported by the fact that extensive planning and other activities have been under way for some time regarding construction of several regional water supply reservoirs in the northern part of the State. One or some of them will no doubt be involved with the decisions associated with proposed solutions to the multi-state water controversy. Further, it is inevitable that the "federal" involvement prerequisite to NEPA application will be obvious - thus triggering the need for compliance with NEPA.

Consultations required under NEPA will effectively require consideration of an array of factors including conservation, economic, property and recreational interests.

INFLUENCE OF THE CLEAN WATER ACT OF 1977

The Clean Water Act of 1977 (CWA) (33 U.S.C. §§1251 et seq.) is one of the most complex resource protection statutes we have today. It is a revolutionary departure from pre-1972 water quality protection efforts - that were remarkably ineffective. The CWA requires complex regulatory innovations and enforcement. These regulations, largely the responsibility of the Environmental Protection Agency (EPA), include promulgation of effluent limitations, water quality standards and the application of various control technologies.

Another requirement of the CWA that is relevant to the issues that will be raised in the context of the fair allocation or apportionment of interstate waters, is the preservation of life systems in the water column and on the water bottoms. Repeatedly throughout the statute, in the context of the description of various levels of required water quality attainment and technology application, the law additionally requires preservation of life functions. The language often used is that, when a specified effluent limitation will not ". . . assure the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allow recreational activities in and on the water . . .", then more stringent clean-up controls are required. (33 U.S.C. §§ 1312, 1313 and 1342). These water quality preservation mandates are intricately related to volume or flow characteristics and therefore will figure significantly in flow allocation among competitors on interstate water courses.

THE AMENDED STATE RIPARIAN WATER ALLOCATION LAW

In 1977, the Georgia General Assembly virtually erased 275 years of Georgia water allocation law, the old riparian system, and replaced it with a permit system. While the new regime retains some characteristics of previous legal

norms as well as some attributes of the prior appropriation system, it essentially places broad discretionary authority in the state government's hands to allocate the surface water resources of the state. There is ample authority in this scheme to fashion interstate water allocation solutions that should allow for a negotiated settlement to the current dispute, regardless of which of the techniques described above are selected for this purpose.